

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Johnny Lee Gore,)	
)	
Petitioner,)	Civil Action No.: 3:03-12
)	
vs.)	
)	
United States District Court of South Carolina,)	ORDER
)	
Respondent.)	
_____)	

On January 31, 2003, Johnny Lee Gore (“petitioner”) filed this pro se petition for a writ of mandamus pursuant to 28 U.S.C. § 1651. On February 4, 2003, Magistrate Judge Joseph R. McCrorey issued a report analyzing the issues and recommending that the Court dismiss this petition *without prejudice* and without issuance of service of process. The petitioner did not respond to the report and recommendation. On April 22, 2004, this Court adopted the report and recommendation and dismissed the petition.

On May 3, 2004, the petitioner filed a motion to vacate this Court’s order dismissing this case on the ground that the petitioner never received the report and recommendation. The Court granted the motion, and on December 13, 2004, the Court vacated its order dismissing the case. On February 2, 2005, the petitioner filed objections to the report and recommendation. This matter is now ready for disposition.

The petitioner commenced this action to expedite the Court’s consideration of his habeas

corpus petition under 28 U.S.C. § 2241 filed in civil action number 2:02-1894. Magistrate Judge McCrorey recommended dismissing the action as frivolous and deeming dismissal a strike for the purposes of the “three strike rule.” 28 U.S.C. 1915(g). The petitioner objects to deeming his claim frivolous and the resulting strike on the grounds that he has a right to file a petition for habeas corpus and his underlying criminal conviction was invalid.

The petitioner filed the action for habeas corpus while the appeal of his criminal conviction was pending. On January 10, 2003, Magistrate Judge Robert S. Carr issued a report and recommendation in civil action number 2:02-1894. This report recommended dismissing the action without prejudice on the grounds that the petitioner was challenging the validity of his conviction which is appropriately presented on direct appeal or in an action under 28 U.S.C. § 2255. On February 2, 2004, the Court adopted the report and recommendation. On February 18, 2005, the Fourth Circuit Court of Appeals affirmed the Court’s order dismissing the action.

The petitioner filed this action for mandamus six months after he filed the habeas corpus petition in civil action number 2:02-1894 and while his criminal appeal was pending. The action was moving towards conclusion when he filed the petition for mandamus. The Court agrees with Magistrate Judge McCrorey’s recommendation to dismiss the action as frivolous and to deem dismissal a strike against the petitioner. See In re Jacobs, 213 F.3d 289, 290 (5th Cir. 2000)(The Fifth Circuit Court of Appeals dismissed mandamus action as frivolous and considered it a strike under section 1915).

Accordingly, the Court adopts Magistrate Judge McCrorey’s report and recommendation and dismisses this action *without prejudice* and without issuance of service of process. The

dismissal of this cause of action is deemed a strike for the purposes of the “three strike rule.” 28
U.S.C. § 1915(g).

AND IT IS SO ORDERED.

A handwritten signature in black ink, reading "C. Weston Houck". The signature is written in a cursive, flowing style.

**C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE**

May 24, 2005
Charleston, South Carolina